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MICHAEL RODAK, JR., CLERK

No. 71-1062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

THE PROCTER & GAMBLE COMPANY, *Petitioner*,

v.

THE PUREX CORPORATION, LTD., *Respondent*.

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

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Some eight years ago this Court expressly declined to read the evidentiary provision in Section 5 of the Clayton Act as encompassing administrative determinations. It did so fully recognizing that the objective of the statute was to aid private treble damage claimants but also recognizing that the characteristics of the administrative process, particularly in 1914 when the statute was enacted, were such as to create a most serious doubt that Congress contemplated that an

administrative decision should provide an evidentiary basis for money damage recovery by a third party. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 379 U.S. 877 (1964) (*3M*). That decision has imposed upon the courts and litigants involved in the private enforcement of the antitrust laws a pall of uncertainty that will remain until the questions it raises are authoritatively resolved.

The passage of time has by no means dispelled the doubts as to the quality of administrative fact finding that underlie the questions reserved in *3M*. For example, the member of the Federal Trade Commission who wrote for the Commission in the instant case, a distinguished and experienced public servant, has since made unmistakably clear the extent to which the proceedings of that agency constitute policy making rather than adjudication. His reasoned conclusions are that administrative efforts at "case-by-case adjudication" have not only been "inefficient and ineffective" but "in many cases, unfair". As for the "test case"—the Commission proceeding against this petitioner was admittedly of that character—his observation is that the result "is likely to be a foregone conclusion".*

Neither the Court below nor the Court of Appeals for the First Circuit, which has also dealt with the evidentiary provision in Section 5, chose to grapple with the fundamental issues raised and reserved in *3M*. While respondent's brief in opposition argues in favor of the result reached by the Court below, it too treats the unsettling observations of this Court in *3M* as though they had never been uttered. A writ of

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* Elman, *The Regulatory Process: A Personal View*, 39 ABA Antitrust Section 901, 907-08 (1970).

certiorari should be granted to consider the implications of that decision and to settle authoritatively this important question in the private enforcement of the antitrust laws.

Respectfully submitted,

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